APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF DELAWARE DATED AND DECIDED JUNE 27, 2002

IN THE SUPREME COURT OF THE
STATE OF DELAWARE

No. 594, 2001, 595, 2001
Consolidated

IN RE
INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

Court Below: Court of Chancery
of the State of Delaware in
and for New Castle County
C.A. No. 18219

Submitted: April 17, 2002
Decided: June 27, 2002

Before **WALSH, HOLLAND** and **STEELE**, Justices.

Upon appeal from the Court of Chancery. **AFFIRMED.**

In October 2001, the Court of Chancery approved a settlement reached between Appellees, defendants-below, Infinity Broadcasting and Viacom, Inc. and Appellees, plaintiffs-below, Infinity shareholders in response to litigation challenging the fairness of a tender offer by Viacom. Before the merger, Viacom owned approximately 64 percent of the outstanding equity in Infinity. In August 2000, Infinity announced that Viacom had offered to acquire the remaining

shares of Infinity common stock in return for Viacom common stock. The proposed exchange ratio was 0.564 shares of Viacom stock for each share of Infinity stock.

Almost immediately after the announcement, a number of Infinity's minority stockholders filed eleven separate actions in the Court of Chancery, each challenging the fairness of the Viacom offer. In addition, several similar suits were filed in other jurisdictions, including two suits filed by Appellants, intervenors-below, Linda Juarez and Anne M. Pezza-Fiorillo in the New York Supreme Court for New York County, which is the principal place of business for both Infinity and Viacom. Although the Delaware cases were consolidated into a single action, Juarez and Pezza-Fiorillo chose not to intervene here until they filed their challenge to the Court of Chancery's approval of a settlement of the consolidated suit and their petition for a portion of the Chancellor's award of attorneys' fees. The latter is at the heart of the appeal before us.

Less than three months after the announcement of the offer, the Delaware plaintiffs entered into a global settlement with Infinity on behalf of a class consisting of Infinity shareholders. Appellant, objector-below, Len Fernandes[1] objected to the settlement in the Court of Chancery on the grounds that its terms were unfair and tainted by inadequate class representation. He now appeals the Chancellor's

1. By order of this Court dated June 18, 2002 and pursuant to Supreme Court Rule 31, Sally Fernandes has been substituted for Appellant, objector-below, Les Fernandes in the above captioned appeal.

decision overruling his objection. Appellants Juarez and Pezza-Fiorillo raise a separate issue on appeal, namely that the Chancellor erred in his allocation of an award of 2.25 million dollars in attorneys' fees to counsel appearing in the Delaware Action. Juarez and Pezza-Fiorillo contend that they conferred a substantial benefit to the class as a result of their prosecution of the New York litigation and that the Chancellor wrongly denied their counsel a share of that award. After considering those arguments, we find that the Chancellor based his decision on the correct interpretation and application of Delaware law and that his factual findings have ample support in the record. Therefore, we affirm the judgment of the Court of Chancery.

The Delaware Action and Settlement

After Infinity shareholders filed eleven substantially identical complaints in the Court of Chancery, the court quickly consolidated the separate suits into a single action.[2] Each of these putative class actions alleged that Infinity, its board of directors, and Viacom breached their respective fiduciary duties of loyalty and care arising out of the factual assertion that the amount of Viacom stock offered as consideration for the merger was inadequate. In each instance, the proposed class consisted of all holders of Infinity common stock, excluding, of course, the defendants. The plaintiffs sought to enjoin the merger and to recover both compensatory and punitive damages, as well as attorneys' fees and costs. Once the court had consolidated the cases, the Chancellor appointed the law firms of Milberg Weiss Bershad Hynes &

2. Hereinafter the "Delaware Action."

Lerach, LLP and Abbey Gardy & Squitieri as co-lead counsel and the Delaware firms of Chimicles & Tikellis and Rosenthal Monhait Gross & Goddess, P.A. as co-liaison counsel to oversee the prosecution of the Delaware Action.

Concurrent to the litigation, and similarly in response to Viacom's offer, Infinity appointed a special committee of independent directors to provide recommendations to its board of directors concerning the proposed merger and to conduct any necessary negotiations with Viacom's representatives. The record reveals that the special committee and Viacom engaged in extensive talks concerning the terms of the tender offer. Among the most highly contested issues was the exchange ratio, which the special committee actively sought to increase. Class counsel in the Delaware Action also engaged in negotiations with Viacom's representatives concerning the need for an increase in the exchange ratio as part of any potential settlement. In late October, Delaware counsel reached a settlement with the defendants that, *inter alia*, increased the exchange ratio from the 0.564 shares of Viacom stock it proposed at the outset of its bid to 0.592 shares per Infinity share. During that same period of time, the special committee and Viacom's representatives were reaching an identical resolution. On October 30, 2000, on the advice of its financial advisors,[3] the committee voted to recommend that the Infinity board of directors approve the merger at the same exchange ratio of 0.592 shares of Viacom

3. At an October 30, 2000 special committee meeting, the financial advisors informed the committee that they believed the negotiated exchange ratio to be fair, from a financial point of view, to the non-Viacom holders of outstanding Infinity Class A common stock. They later confirmed these opinions in writing.

stock per Infinity share. Shortly thereafter, the parties to the Delaware Action presented the settlement to the Court. In turn, the Chancellor approved it.

The Fernandes Objection

Initially, we address Appellees' contention that Appellant Fernandes lacked standing to object to the settlement in the Court of Chancery. The transcript of the settlement hearing indicates that the parties chose not to present the issue of standing to the Chancellor during that proceeding. Although class counsel stated for the record that he was unwilling to concede Fernandes' standing, he admitted that the trial court did not necessarily need to decide the issue. Because counsel did not pursue the issue at that hearing and the record reveals no further inquiry into the standing issue, we find that it was not fairly presented to the Court of Chancery for decision. This Court generally will not address the merits of any issue not presented to the trial court and we find no compelling reason to depart from that standard in our consideration of this appeal.[4]

Any decision of the Court of Chancery regarding the fairness of a proposed settlement is within the discretion of that court and requires an application of its own business judgment.[5] This Court will review a decision regarding fairness only to the limited extent of determining whether "the findings and conclusions of the trial judge are supported by the record and [are] the product of an orderly and logical

4. Supr. Ct. R. 8.

5. *Rome v. Archer*, 197 A.2d 49, 54 (Del. 1964).

deductive process, [if so] they will be accepted."[6] We will not substitute our own business judgment for that of the Court of Chancery.[7] Fernandes contends that the Chancellor abused his discretion by approving a settlement that was unfair to the articulated class of Infinity shareholders. His principal argument rests on the notion that close scrutiny of the facts in the record reveals that the settlement provided nothing more than an illusory benefit that failed to adequately protect the rights of the class members. Specifically, he claims that this Court should hold that the illusory benefit is insufficient to extinguish the individual claims of members of the class and that it also precludes the Chancellor's award of any substantial attorneys' fees.

Fernandes argues that this Court need not look farther than the actual monetary value of the Viacom shares to find that alleged benefit to be, in essence, a sham. Because of a dramatic drop in the price of Viacom stock after the tender offer was announced, the actual cash value for Infinity's stockholders at the time of settlement was significantly reduced. In turn, he contends, this should have triggered an increase in the exchange ratio to maintain the cash-equivalent benefit conveyed to the stockholders.[8] This would be a

6. *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986) (citing *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).

7. *Rome*, 197 A.2d at 54.

8. It is apparent from the record that the terms of the offer were not subject to an adjustment that would require a change in the exchange ratio to reflect the ongoing price of Viacom stock. Even if there had been, the record reveals that a general dip in the market similarly devalued Infinity and other companies.

persuasive argument, however, only if we were to consider the cash price at settlement to be the proper measure of the benefit conferred in a challenged stock-for-stock merger. In fact, our courts have found that the Court of Chancery need not limit itself to an examination of the immediate tangible results to a corporation or its shareholders in determining the fairness of a settlement agreement.[9] The probable long-term benefits of the settlement are also properly considered.[10] Indeed, mergers like that at issue in this appeal are undertaken primarily in the anticipation of long-term benefits. Assuming a rational decision-making process, Viacom would only have tendered its offer for outstanding Infinity stock if it believed that the merger would produce a net increase in value. A short-term fluctuation in stock price does nothing to alter this extended outlook. Moreover this is a benefit that Infinity shareholders can reasonably expect to reap as new holders of Viacom stock. Therefore, it could fairly be concluded that the increase in the number of Viacom shares allotted to each class member as a result of the settlement produces a long-term benefit even where there is no triggered increase in the exchange ratio to reflect an updated market price fluctuation.

Having established that the benefit received by the increase in stock ratio as a result of negotiation was more than illusory, we now turn to the question of whether the terms of this settlement should properly include an award of attorneys' fees. As Fernandes is quick to point out, the timeline in the record shows that the Infinity special

9. *Prince v. Bensinger*, 244 A.2d 89, 95 (Del. Ch. 1968).

10. *Id.*

committee actively advocated an increased exchange ratio at the same time that class counsel sought an increase in the exchange ratio in the Delaware Action. The inference he suggests we must draw from this fact is that the special committee's work solely resulted in the benefit to the Infinity shareholders and that class counsel's efforts can fairly be considered redundant, insignificant or superficial. This disregards our well-established case law that, in the absence of evidence that the litigation did not result directly in a cognizable benefit to the class, we recognize a presumption that there is a causal relationship between the benefit and a timely filed suit.[11] Moreover, the settlement stipulation in the case at bar specifically states that Viacom "took into account the desirability of satisfactorily addressing the claims asserted in the [Delaware] Action in agreeing to increase the consideration to be conveyed to Infinity's public stockholders . . . and as such the Action was a positive contributing factor in Viacom's decision to increase the Merger consideration." Even though this suggests that the Delaware Action was only a partial cause of the benefit received as a result of the increase, counsel applying for attorneys' fees do not need to show that they were the sole cause of a benefit conferred by settlement in order to have earned a fair, adequate and reasonable fee for their work on behalf of the class.[12]

Fernandes also appeals the Chancellor's determination that the named plaintiffs adequately represented the class as

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11. *McDonnell Douglas Corp. v. Palley*, 310 A.2d 635 (Del. 1973)

12. *In re Resorts Int'l S'holders Litig.*, Del. Ch., Civ. A. Nos. 9470, 9605, 1990 WL 154154, Hartnett, V.C. (October 11, 1990).

required by Court of Chancery Rule 23(a)(4) and implied in Rule 23.1.[13] We have held that the Court of Chancery's determination of the adequacy of a class representative is an "essential component" of the settlement approval process.[14] The Chancellor clearly addressed this issue both from the bench and in his final order approving the settlement, explicitly stating that the shareholder class had been adequately represented. Although Fernandes cites deposition testimony taken from class counsel that suggests limited contact and substantially passive involvement by certain named plaintiffs, a nominal plaintiff's lack of personal familiarity with an action is not determinative of that representative's adequacy.[15] Our case law requires little more than that a representative be generally familiar with the litigation.[16] Indeed, our legal system has long recognized the appropriateness of an attorney taking the dominant role in derivative proceedings.[17] Therefore, the mere fact that class

13. *See Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d at 1039, 1045 (Del. 1996) (Rule 23.1 includes an implicit requirement that the named plaintiffs in a settlement class have adequately represented the class as a whole).

14. *Id.*

15. *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126 (Del. Ch. 1999)

16. *Id.*

17. *Id.* In fact, as the Chancellor noted in *In re Fuqua Indus.*, allowing private attorneys to bring suits on behalf of nominal shareholder is vital to the functioning of our partially privatized enforcement mechanism for policing fiduciaries. *Id.*

counsel undertook the dominant role in this litigation in no way suggests that the class representatives must be found to have inadequately represented the class. We find that sufficient evidence exists in the record to support the Chancellor's conclusions on the adequacy of the named plaintiffs' representation.

The Challenge to the Award of Attorneys' Fees

Juarez and Pezza-Fiorillo, on the other hand, do not, in this appeal, challenge the adequacy of the settlement or an award of fair, adequate and reasonable fees. Instead, they claim that the Chancellor erred as a matter of both law and fact by failing to assign or allocate a portion of the attorneys' fees actually awarded to counsel who solely participated in the New York litigation. Appellants first contend that the Chancellor based his ruling on an inaccurate interpretation of Delaware law. Juarez and Pezza-Fiorillo argue that the Chancellor ruled as a matter of law that only counsel who litigated before him in the Court of Chancery were entitled to a portion of the attorneys' fees, regardless of any benefit that may have been conferred by actions pursued in other jurisdictions. We fully agree that, had the Chancellor, in fact, ruled as alleged by Appellants, he would have incorrectly stated the law. Counsel pursuing litigation in any jurisdiction is entitled to a share of attorneys' fees in a settlement of a Delaware action if their efforts elsewhere conferred a benefit realized as part of the Delaware settlement.[18] Nevertheless, we do not read

18. *See, e.g., Sanders v. Wang*, Del. Ch., 2001 WL 599901, C.A. No. 16640, Steele, V.C. (May 29, 2001) (let.op.) (denying attorneys fees to counsel who filed suit in New York on grounds that the New York action failed to contribute to the beneficial results of the Delaware litigation).

the Chancellor's final order and remarks from the bench to be an asserted deviation from or variation on a well-established principle of our corporate law. We find it clear on this record that the basis for his ruling that New York counsel would not share in the fee award was not because they had failed to appear in the Delaware Action, but because the New York litigation neither promoted or influenced the global settlement in any meaningful way nor resulted directly in any benefit to the shareholder class.

We do not assign the same importance as Juarez and Pezza-Fiorillo to the Chancellor's comment from the bench that the only way counsel can be *assured* of a part of the award is to appear before the Court of Chancery and petition to become class counsel or co-counsel in Delaware litigation. Indeed, this is hardly a new statement of law. Instead we read it simply as a common sense statement of a readily observable fact, specifically intended for the *future reference* of counsel to whom he was denying fees. At no point does the Chancellor suggest that this was the basis for his decision. He merely voiced the rather obvious reality that the only *sure* way for *any* judge to know if, and to what extent, counsel have conferred a benefit in shareholder litigation is if they have actively appeared in front of him throughout the litigation. This in no way excludes any proper application for fees, including those arising from litigation in other fora, so long as counsel can substantiate that their involvement and efforts in other litigation resulted in a benefit to the class derived from the settlement.

Juarez and Pezza-Fiorillo allege that the language of the Chancellor's cover letter to his final order supports their

claim that the Chancellor misstated the law. The single sentence to which they point in that brief letter states: "If New York counsel want to apply for counsel fees in the New York cases, that is up to them." First, we note that the cover letter accompanying an order is hardly the definitive place for a party to seek the legal underpinnings of a judge's ruling, especially when that actual ruling can be found in a detailed written order, supplemented by extensive comment from the bench on the ruling. To avoid other misguided inferences that some might seek to draw from the Chancellor's statement, we restate that our law allows counsel pursuing litigation in other jurisdictions to seek attorneys' fees in Delaware so long as their efforts elsewhere have conferred a benefit that contributed to the settlement of similar suits here. Here, the suggestion that the Chancellor ruled that the New York court was the sole forum in which counsel litigating there could seek a fee award is misleading. We conclude in light of the record in this case and the Chancellor's comments both from the bench and in his final order, that he neither based his ruling upon the premise asserted by Juarez and Pezza-Fiorillo, nor did he intend that the parties consider it to be the law of the case.

This Court cannot state with any assurance what prompted the Chancellor's almost tangential comment in that letter. However, we can speculate that it was in part a result of the frustration that accompanies chimeric claims for awards of attorneys' fees. As we discuss *infra*, counsel for Juarez and Pezza-Fiorillo offered no substantial evidence to support their claim that they conferred a benefit on the class by positively affecting the settlement in Delaware which could entitle them to an allocation of the fee award. Despite

invitations to join the Delaware litigation and represent the interests of their clients before the Court of Chancery, counsel chose not to intervene until the time arose to allocate a fee. While our courts welcome the intervention of any party, including attorneys with valid claims for attorneys' fees, we can certainly understand the Chancellor's impatience with hollow claims, especially in light of the tendency for those claims to consume our limited judicial resources.

Since we find it clear that the Chancellor applied the correct legal standard, this Court must now turn to the secondary question of whether the Chancellor abused his discretion by determining that counsel for the New York litigants were not entitled to a share of the fee award. Juarez and Pezza-Fiorillo's claim that their attorneys are entitled to a portion of the fee award requires an analysis of the impact that the New York litigation had on the settlement of the Delaware Action. The determination of any award is a matter within the sound judicial discretion of the Court of Chancery.[19] A careful study of the record indicates that the Chancellor's decision not to award fees to counsel for the New York litigants is fully supported by the evidence that was before him and that, therefore, he did not abuse his discretion.

We have articulated several factors that the Court of Chancery must consider in determining any award of attorneys' fees. They include: (1) the results accomplished for the benefit of the shareholders; (2) the efforts of counsel and the time spent in connection with the case; (3) the

19. *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 547 (Del. 1998).

contingent nature of the fee; (4) the difficulty of the litigation; and (5) the standing and ability of counsel involved.[20] All of the *Sugarland* factors are contingent upon the benefit at issue being *causally related to the efforts of counsel* in pursuing their action.

A number of factors in the record support the Chancellor's conclusion that counsel for the New York litigants failed to confer a benefit upon the class that would entitle them to an award of attorneys' fees. Because Juarez and Pezza-Fiorillo failed to participate in the Delaware litigation in any meaningful way, any evidence of a benefit must result from the impact of the New York litigation itself. When determining the amount and distribution of an award, the mere pendency of litigation alone does not establish the causal connection between counsel's efforts and changes in the merger terms that benefit the shareholder class. In this appeal, the record is devoid of evidence that the New York litigation in any way influenced the settlement approved by the Court of Chancery.

Juarez and Pezza-Fiorillo conceded at the settlement hearing that their counsel did not take part in any settlement negotiations with the special committee or the directors of the defendant corporations as part of their prosecution of their claims. More importantly, the record belies Appellants claims that they actively pursued the litigation in the New York Supreme Court. The mere fact that Juarez and Pezza-Fiorillo served document requests does not necessarily demonstrate "a seriousness of purpose and an intent to litigate

20. *Sugarland Industries Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980).

hard" that would move the defendants to settlement, as Appellants contend; nor does their briefing and argument of a motion for expedited discovery. When it denied that motion, the New York Supreme Court made clear that it considered the proper forum for resolving this dispute to be the Court of Chancery. This is consistent with our reading of New York case law, which favors the resolution of corporate governance disputes in the state of incorporation, under the "internal affairs doctrine."[21] Although the record does not indicate that there was a formal stay in the New York proceedings, it is clear not only that the case was not actively prosecuted during the existence of the Delaware litigation, but that it presented a threat so insubstantial that it is unlikely to have had meaningful influence on the decision of Viacom and Infinity to settle the Delaware Action. We find that the Chancellor did not abuse his discretion when he denied Juarez and Pezza-Fiorillo's counsel a percentage of the attorneys' fees award under these circumstances.

The judgment of the Court of Chancery is affirmed.

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21. *Hart v. GMC citing Mantei v. Creole Petroleum Corp.*, 402 N.Y.S.2d 822 (N.Y. App. Div. 1978).

APPENDIX B — ORDER AND FINAL JUDGMENT OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE, IN AND FOR NEW CASTLE COUNTY DATED OCTOBER 29, 2001

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Consol. C.A. No. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

ORDER AND FINAL JUDGMENT

The Stipulation and Agreement of Compromise, Settlement and Release, dated February 7, 2001 (the "Stipulation"), of the above-captioned consolidated action (the "Action"), having been presented at the Settlement Hearing on September 25, 2001, pursuant to the Scheduling Order for Approval of Settlement of Class Action entered herein on June 25, 2001 (the "Scheduling Order"), which Stipulation was joined and consented to by all parties to the Action and which (along with the defined terms therein) is incorporated herein by reference; and the Court having determined that notice of said hearing was given in accordance with the Scheduling Order to members of the Class as certified by the Court in the Scheduling Order and that said notice was adequate and sufficient; and the parties having appeared by their attorneys of record; and the attorneys for the respective parties having been heard in support of the settlement of the Action, and an opportunity to be heard having been given to all other persons desiring

to be heard as provided in the notice; and the entire matter of the Settlement having been considered by the Court;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, this 29th day of October, 2001, as follows:

1. The Notice of Pendency of Class Action, Temporary and Proposed Class Action Determination, Proposed Settlement of Class Action, Settlement Hearing and Right to Appear ("Notice to the Class") has been given to the Class (as defined hereinafter), pursuant to and in the manner directed by the Scheduling Order, proof of the mailing of the Notice to the Class was filed with the Court by counsel for Defendants and full opportunity to be heard has been offered to all parties, the Class and persons in interest. The form and manner of the Notice to the Class is hereby determined to have been the best notice practicable under the circumstances and to have been given in full compliance with each of the requirements of Delaware Court of Chancery Rule 23, and it is further determined that all members of the Class are bound by the Order and Final Judgment herein.

2. Pursuant to Court of Chancery Rules 23(a) and 23(b)(1) and 23(b)(2):

a. The Court finds that (i) the Class, as defined below, is so numerous that joinder of all members is impracticable, (ii) there are questions of law and fact common to the Class, (iii) the claims of the plaintiffs are typical of the claims of the Class, and (iv) plaintiffs will fairly and adequately protect the interests of the Class,

b. The Court finds that plaintiffs and their counsel have adequately represented the interests of the Class with respect to the Action and the claims asserted therein;

c. The Court finds that the requirements of Court of Chancery Rules 23(b)(1) and (2) have been satisfied;

d. The Action is hereby certified as a class action on behalf of all record holders and beneficial owners of shares of common stock of Infinity Broadcasting Corporation ("Infinity" or the "Company") (other than Defendants and their "affiliates" and "associates" (as those terms are defined in Rule 12b-2 promulgated under the Securities Act of 1934)) on any day during the period from August 15, 2000 to and including the effective date of the consummation of the Merger, including the legal representatives, heirs, successors in interest, transferees or assigns of all such foregoing holders and owners, immediate and remote (the "Class"); and

e. Plaintiffs are hereby certified as Class representatives and their respective counsel are certified as Class counsel.

3. The Settlement, and all transactions preparatory or incident thereto, are found to be fair, reasonable and adequate and in the best interests of the Class, and it is hereby approved. The parties to the Stipulation are hereby authorized and directed to comply with and to consummate the Settlement in accordance with its terms and provisions, and the Register in Chancery is directed to enter and docket this order and Final Judgment in the Action.

4. This Order and Final Judgment shall not constitute any evidence or admission by any party herein that any acts of wrongdoing have been committed by any of the parties to the Action and should not be deemed to create any inference that there is any liability therefor.

5. The Action is hereby dismissed with prejudice as to all defendants and against plaintiffs and all other members of the Class on the merits without cost except as provided in the Stipulation. All claims, rights, demands, suits, matters, issues or causes of action, whether known or unknown, of plaintiffs and of all members of the Class against all defendants and their respective present or former officers, directors, stockholders, employees, agents, attorneys, representatives, advisors, financial advisors, investment bankers, commercial bankers, lenders, persons who provided fairness opinions, accountants, insurers, trustees, associates, affiliates, parents, subsidiaries (including the directors and officers of such affiliates, parents and subsidiaries), general and limited partners and partnerships, heirs, executors, personal representatives, estates, administrators, successors and assigns (collectively, "Defendants' Affiliates"), whether under state or federal law, including the federal securities laws, and whether directly, indirectly, derivatively, representatively or in any other capacity, in connection with, or that arise out of, any claim that was or could have been brought in the Action, or that arise now or hereinafter out of, or that relate in any way to, the acts, facts, or events alleged in the Action, including without limitation all claims asserted in *Pezza-Fiorillo v. Infinity Broadcasting Corp.*, No. 00/603553 (Sup. Ct. N.Y. Cty.) (Hon. Herman Cahn) and *Juarez v. Infinity Broadcasting Corp.*, No. 00/603524

(Sup. Ct. N.Y. Cty.) (Hon. Herman Cahn), or any action relating in any way to the Proposed Merger, the Merger and any amendment thereto, the negotiation and consideration of the Proposed Merger, the Merger, and any agreements and disclosures relating thereto, any acts, facts, matters, transactions, occurrences, conduct or representations relating to or arising out of the subject matter referred to in the Action, or the fiduciary or disclosure obligations of any of the Defendants (or persons to be released) with respect to any of the foregoing (whether or not such claim could have been asserted in the Action) are hereby compromised, settled, released and dismissed with prejudice (the "Settled Claims"). Dismissal of the Settled Claims with prejudice and on the merits shall become effective immediately upon the entry of this Order and Final Judgment and without any further action by the Court.

6. Plaintiffs' attorneys are hereby awarded fees and expenses in the amount of $2,500,000 in connection with the Action, which fees and expenses the Court finds to be fair and reasonable and which shall be paid to plaintiffs' attorneys in accordance with the terms of the Stipulation. Plaintiffs' Co-Lead Counsel shall allocate such fees and expenses as they deem appropriate.

s/ William B. Chandler
Chancellor

APPENDIX C — TRANSCRIPT OF DECISION OF DELAWARE CHANCERY COURT DATED SEPTEMBER 25, 2001

IN THE COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

C.A. No. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

Chancery Courtroom No. 106
Daniel L. Herrmann Courthouse
Wilmington, Delaware
Tuesday, September 25, 2001
11:09 a.m.

BEFORE: HON. WILLIAM B. CHANDLER, III, Chancellor.

* * *

THE COURT: In the light of what Mr. Abramczyk said at the opening, I'm obviously not going to sign a final order today, but I can give you, tentatively and preliminarily, how I intend to rule. Before I do that, I want to pick up on a theme that was expressed by Mr. Abramczyk in explaining why we would have to perhaps adjourn this hearing.

I'm very impressed that you all are here from New York, and our hearts go out to you. The Delaware bar and the bench have been very concerned about the situation, the tragedy there and in Washington. And if any member of the New

Appendix C

York bar has cases pending in this Court, or any other court in Delaware, I want you to know that we are prepared to work with you to extend deadlines and give you additional time to do those things. I hope you know that already from dealing with the Court and the other courts in Delaware. But we certainly understand the difficult and trying circumstances you are working under, and want you to know that to whatever extent we can be helpful, we want to be.

I have been in touch with people in New York that I know, and tried to be assured about their safety and the safety of their loved ones. I want you to know that we feel for your difficult situation, and we are willing to work with you to help you. The fact that you all travelled here today I really appreciate. I didn't expect it. I didn't think that you would be able to do that, necessarily. If you had asked for a postponement, I certainly would have been trying to find any way possible to accommodate you.

Now, having said that, like Mr. Abramczyk said, since you all made the journey and you have come today, I think you are entitled, at the very least, to know the Court's thinking on the settlement proposal. So I'll turn specifically first to the settlement itself, and the objections that have been lodged to it.

I am required to determine, and I will determine, that this action does meet all the requirements for certification as a class action. I don't believe there are any objections to that, now, either. All of the elements under Rule 23, it seems to me, have been satisfied.

Appendix C

I don't need to go through the elements of typicality, numerosity and the adequacy of representation of these plaintiffs. Although initially challenged, I think to my satisfaction, from the affidavits being filed, there is no question about their adequacy. There is no indication in the record of any conflict that would disable them or disqualify them from being adequate representatives. Likewise, I say the same for counsel to the class.

Then turning to what this Court is obliged to do in approving or passing upon a proposed settlement of an action of this sort, of course the law clearly is that we don't try the merits. We apply our own business judgment to determine whether the settlement appears to be fair, reasonable and adequate. And that requires us to assess in a rough way the nature of the claims that were going to be asserted, and the likelihood they could have prevailed, versus the costs of achieving such a victory, the risks of failure in not being able to achieve a successful resolution in the trial of the action, and other factors, including the time delays of the — of trying the action and ultimately appealing it, and so forth.

This, with a large controlling shareholder deciding to offer a stock-for-stock exchange for the shares — of those shares of stock held by members of the public, there would have been an application of a rigorous standard, the entire fairness standard of review, but I think that given the players involved, the role of the special committee and its advisors, it would have been a rather difficult hill to climb for the plaintiff class in this case.

I don't say that lightly. I do give due credit to the able counsel for the class, who would have surely made heroic efforts in that regard. I still think it would have been not an easy walk — or easy path to walk down. Given that, and given what was at stake, the increase in the exchange ratio, it seems to me, is a reasonable and fair resolution of the claims that are being given up.

Now, the objectors, who — I take at face value and I accept fully that the objectors — Mr. Fernandes is a real shareholder of Infinity, was and has genuine concerns, honestly-held concerns, about the fairness of this settlement. But I think that every stockholder of Infinity, if asked today, "Would you rather have .564 shares of Viacom or would you rather have .592 shares of Viacom," would not take long or hesitate long in making that choice as to which they would prefer. If they were asked, "Do you think it's better for you to have .592 than .564," I think almost to the person they would answer, "Yes, it is."

The difficulty with mergers whose terms don't include collars or floors or ceilings is that you are subjecting yourself to the risks of the market or, as Mr. Abbey said, you are also — there is the possibility, I suppose, of opportunities to gain from it, as well, if the market were to move in that direction. But without collars on either side of that measuring rod, you are subject to the risks of the ups and downs of the market.

Does that mean that that extinguishes the benefit or that one can say this achieved no benefit, there was nothing gained for the stockholders of Infinity when this exchange ratio was increased? Fundamentally, I just don't agree that common sense would lead you to that conclusion. And I respect Mr. Brautigam's

argument, and that of Mr. Fernandes, that they don't believe it has. I'm given some comfort from knowing that a lot of other shareholders apparently feel differently. If they felt it did not achieve some benefit or was not worth something, then I think I would have heard from a far greater number, who clearly have enough voice to make themselves known. I fundamentally can't agree with you, Mr. Brautigam, although I appreciate the nature of the argument. I understand why it's being made for Mr. Fernandes.

I pass over, by the way, entirely the standing argument. I don't think I need to reach it. I'm willing to accept for purposes of argument that Mr. Fernandes has standing. I, rather, think that I just fundamentally disagree with Mr. Fernandes on the core merits of his objection. And that's the only basis upon which I really reject the objection. All the other arguments, I put to one side. I don't need to reach them.

Having said that, then, I'm prepared to approve the settlement, ultimately, when a final order is presented and the necessary time has elapsed to be sure that the notice has been received and any further objections have either not been made, or have been. If they are, then I'll deal with them at that time.

Then I turn next to the fee application, which those of you who know me understand my predilection — I suppose you could put it that way — about this. This is not always an easy aspect of the application. Sometimes they are easy. Sometimes they are harder. I always tend to think about them rather carefully, even when, in instances of this kind, you

have essentially an application that needs to be paid by the defendants, who have volunteered — that's not the right word, but have agreed to pay a certain fee. And that is a fee that is arguably not coming out of the pockets of the stockholders.

I preface that with the word "arguably." One could make the argument that it could have gone into the pocket of stockholders if it had not been negotiated. It does not come, arguably, out of the pocket of the stockholders. One would think that it's — the negotiation that went on between counsel for defendants and counsel for the plaintiff class ought to serve as a rough form of proxy of the fairness and reasonableness of the fee. And that has some intuitive appeal to it.

And one might then say, "Well, Your Honor, why do you need to go any further and think about this at all?" And I have to answer with the only answer that I can come up with for myself, which is because I have a fiduciary obligation to the class. And the Court's obligation to the class is to assure itself that the fee is reasonable and fair, even one that has been negotiated between adversaries, even one that has been agreed to and perhaps has been hard fought. The Court still is a fiduciary for the class. It still must assure itself that it's a fair and reasonable fee.

The other consideration that I think plays into it a bit is there is an ethical obligation for counsel in all cases, but it's perhaps heightened in the class setting, where you don't have real — a chance for clients to sit down with their attorney and negotiate over a fee. There is an ethical obligation under

the rules of professional responsibility for counsel to charge only a reasonable fee for the services they perform. And again, I think the Court is thrust into the position of being, you know, the measuring stick for that, determining whether it is a fair and reasonable fee.

In this case, we use terms that refer to the size of the benefit. We use them somewhat loosely because of the problems I mentioned earlier with defining the benefit, given the fluctuations of the market and being able to assess just how much of a benefit was achieved.

At whatever level of benefit you seem to focus on, in the end, the fee application falls within the range of percentages that we typically refer to. That is anything from 1 percent to 25. Sometimes as high as 30 or 33 percent has even been approved in this Court.

So the fee application here, falling far at the low end of that range, would seem to also serve as reasonable proxy for its fairness or reasonableness.

The other methodology that the Courts sometimes use solely as a crosscheck, and not to itself being a determination of the fee, is the standard hourly rate times the number of hours that were invested in the case, then multiplied by some premium or multiple based on either how hard the case was litigated before it was settled or how great is the benefit that was achieved for the shareholders. And that multiple or multiplier effect can be used to increase the fee over the standard hourly rate times hours worked. We try not to get caught up into that analysis too much, because it can cause

adverse effects if all you are going to focus on is hours invested. But we do use it as a form of crosscheck sometimes.

In this instance, Mr. Abbey makes a compelling argument for me to accept the fee as proposed. And I'm prepared to do that and award the fee as requested, given the factors that I mentioned, the fact that it was negotiated between adversaries, was agreed to be paid by the company, is outside of, technically, the fund that the stockholders receive.

I'm going to award the full amount of the fee because I think it meets all the standards under Sugarland, both in terms of the benefit and the contingency nature of the work, the standing of counsel and the time and effort invested.

The hardest part of the analysis, I suppose, is exactly how much the efforts of counsel contributed or caused the benefit. And that's an angel on the head of a pin that is too fine for me to balance. I simply think that is too difficult to call. Did it contribute 1 percent to the negotiated settlement? Maybe. Did it contribute 50 percent? Maybe. I just can't assess that.

I mean, there was a special committee involved here, and my suspicions are that it played the dominant role in achieving the increase. I mean, I think common sense tells me that's really where the rubber hit the road and that's what got the increase. But that's not what our law requires me to find. I don't have to find that if you didn't play a major role, if you didn't have at least 51 percent of the contributing effect on the sum being reached, that you don't get a fee. The law of Delaware is clear. If it contributed, if it was some causal

factor, played some part, even, of the analysis, you award the fee.

I think there are reasons, policy reasons, for why Delaware law as evolved in that direction, which I need not digress into given that I'm satisfied that all of the factors, as I said, under Sugarland have been satisfied and the fee application is likewise fair and reasonable and should be awarded.

That leaves only one question, which is absolutely the hardest question today for me, which is — Mr. Abbey might be surprised, because he probably thinks it's the easiest question. But it's where you sit. It's where you sit, Mr. Abbey. That is, is there any basis upon which I ought to say that part of this fee ought to be shared with the New York litigation, and the lawsuits that were filed there? That's a much tougher question. And I will confess that I could easily be mistaken in the judgment I have reached on this, but it's my best view of the way I ought to decide that.

Given that lawsuits get filed all over the country — and they get filed in Delaware a lot, but they get filed other places — there is a process by which these cases can be organized. I'm not privy to it. I don't understand it. Sometimes I think I would like to understand it. Other times I'm just as happy not to understand it.

Once in awhile this Court gets confronted with instances where the internal mechanisms haven't worked to resolve those differences over how the litigation ought to be organized and who ought to be lead counsel and the roles of

all the respective counsel. When we have been drawn into it, it's been kicking and screaming, because we don't like to be drawn into it, and we have said as much in both written opinions and decisions from the bench. We have kept you at arm's length and said, "We don't want to know how you work it out, but work it out somehow." In one or two instances, it has not, and the Court has been forced to resolve the differences over how the litigation was going to be organized and how the cases would be consolidated and, procedurally, how they would go forward. There are a couple of opinions. I have written one. Vice Chancellor Strine has done some.

But this wasn't a case where that occurred. This was a case where I was presented with a consolidation order that everyone agreed to, that was in front of me, at least: "This is how the case is going to be consolidated. This is how it's going to be organized. Here are the counsel who are going to prosecute on behalf of the class." That's what I signed off on as an order.

And it's no reflection upon you at all, Mr. Fisher. You have done an excellent job advocating the position that you took up. And I have a great deal of respect for your argument, but in the end, I'm going to award the fee to the class that I certified in this case, and the counsel who were certified.

In the future — this comes as cold comfort, perhaps, but in the future, if agreement can't be reached — Mr. Abbey is saying positions were unreasonable. Maybe they were. Maybe they weren't. I don't know. But in the future — and I might regret saying this. In the future, if there are disagreements of this kind, then the only way you can be assured that I think

you can get your foot in the door here is if you come to the table and argue and put the motion in front of me that you want a position in advancing the cause on behalf of the class, and then let the Court decide how that shakes out and how the case is going to be consolidated and who are going to be the counsel in charge of leading the litigation.

I may very well appoint you lead counsel. Mr. Abbey has been on the short end of that stick in front of me before. He can testify to it, that it can happen that I'm going to choose counsel based on their aggressiveness. And you are saying that you were aggressive in New York. If you had come to me and said, "We are aggressive and we are going to litigate this," and/or Mr. Brautigam had and said, "I'm going to fight because I think we can get more," that might impress a judge on this Court enough to cause that judge to appoint you lead counsel.

So as I said, it may be cold comfort and I regret that in some ways, but I think at this point that's where I have to come out in the end. I'm going to award the full fee to the counsel who were appointed in this case.

So that's my tentative and preliminary ruling. Mr. Abramczyk, Mr. Abbey, whoever, if you want to get me a final order after the deadline or the date has passed, I'll be able to sign it and fax it to you.

Mr. Schulman, I know, will want a transcript of this proceeding, because of the early reference to him being a genius. So the court reporter should get right on that.

Court is in recess.

APPENDIX D — EXCERPTS OF DEPOSITION OF ABBEY GARDY, LLP, BY ARTHUR N. ABBEY DATED AUGUST 21, 2001

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR THE NEW CASTLE COUNTY

CONSOLIDATED
CIVIL ACTION
NO. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

DEPOSITION of ABBEY GARDY, LLP, by ARTHUR N. ABBEY, taken at the offices of Fink & Carney Reporting and Video, 39 West 37th Street, 6th Floor, New York, New York 10018, on Tuesday, August 21, 2001, commencing at 2:05 o'clock p.m., pursuant to Notice, before Ralph Fink, a Certified Shorthand (Stenotype) Reporter and Notary Public within and for the State of New York.

* * *

Q Mr. Abbey, who is your client in this litigation?

A Well, we represent the class of all the Plaintiffs, and I don't know that I know the name, as I sit here today of our client that our firm represents. I am not sure that I recall.

Q So as you —

A There are 11 cases and I know that we are lead counsel for the class along with Milberg Weiss and all those cases were consolidated but, as I sit here today, I don't recollect the name of our client. I haven't looked at that in a long time.

Q Have you represented this client before?

A Since I don't know the name, I can't tell you that.

Q How did this contact come about? Did this client contact you? Did you contact this person?

MS. FISCH: Objection to the form.

MR. BRAUTIGAM: You are right. That is a bad question. Withdrawn.

Q How did your representation of this client, whomever he or she is, come about?

MS. FISCH: Objection to the form.

A I don't know the answer to that.

Q Have any promises been made to the client?

MS. FISCH: Objection to the form.

A Not to my knowledge.

Appendix D

Q Did the client review the Complaint before it was filed?

A I don't know.

Q Did the client review the Complaint or any files at any time?

A I don't know.

Q How many times have you spoken with the client about this case?

A To my knowledge, never.

Q Has the client been consulted on Settlement by you or anyone representing the class?

A Not by me, but I don't know the answer to that question.

* * *

Q How do you believe that your client, whomever he or she is, was notified of the Settlement in this case?

A I don't know. My answer was I don't know whether the client was notified or not.

* * * *

APPENDIX E — EXCERPTS OF DEPOSITION OF STEVEN G. SCHULMAN DATED AUGUST 23, 2001

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR THE NEW CASTLE COUNTY

CONSOLIDATED
CIVIL ACTION
NO. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

DEPOSITION of STEVEN G. SCHULMAN, taken at the offices of Fink & Carney Reporting and Video Services, 39 West 37th Street, 6th Floor, New York, New York 10018 on Thursday, August 23, 2001, commencing at 10:00 o'clock a.m., pursuant to Notice, before Ralph Fink, a Certified Shorthand (Stenotype) Reporter and Notary Public within and for the State of New York.

* * *

Q And there came a time when Settlement negotiations commenced. Is that correct?

A Involving Plaintiffs' counsel?

Q Yes.

A Yes.

Appendix E

Q When was that?

A Well, I don't think you can give a precise date to it.

Q Why not?

A Because the Settlement discussions occurred through a series of discussions over a continuum of time.

Q When was the first time there were Settlement discussions in your view?

A Well, like I said, there was a whole series of discussions, communication, in my view, and as I understand the facts, as recited in the Stipulation of Settlement, and in the Settlement discussions, if only preliminarily, commenced within days or weeks of the commencement of the litigation and it continued throughout months of September and October, 2000. This is what the actual Stipulation of Settlement recites.

Q Were you involved in the Settlement negotiation?

A As allied counsel, with Mr. Abbey and I knew of, or what was directly involved in such discussion.

Although I wasn't a direct participant in such communication, was Mr. Abbey was a direct participation in every such communication but we did obviously definitely as a team.

* * * *